

**BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON DC 20268-0001**

REVIEW OF NONPOSTAL SERVICES

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Docket No. MC2008-1

**COMMENTS OF  
ASSOCIATION FOR POSTAL COMMERCE,  
ALLIANCE OF NONPROFIT MAILERS,  
DIRECT MARKETING ASSOCIATION,  
NATIONAL POSTAL POLICY COUNCIL  
AND PARCEL SHIPPERS ASSOCIATION  
ON LICENSING AGREEMENTS  
(November 24, 2008)**

Pursuant to Order Nos. 126 and 136, the undersigned parties respectfully submit these comments in response to the November 17 Response of the Postal Service to Order No. 126 regarding licensing agreements. The November 17 filing confirms that the Postal Service's recent entry into the product market of ink jet cartridges for postage meters and printers through the licensing of USPS-branded remanufactured ink jet cartridges is forbidden by 39 U.S.C. § 404(e). Accordingly, those licensing arrangements must be terminated.

(1)

The Postal Service does not claim that Section 404(e) would allow it to sell USPS-branded ink jet cartridges directly, and no such claim could be seriously made. The sale of ink jet cartridges is plainly not a postal service as defined by the PAEA: "the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto," 39 U.S.C. § 102(5). Moreover, the Commission was correct in finding that PAEA makes "no

provision for a third category of services which is neither 'not postal' nor 'not nonpostal,' or, as the Postal Service would have it, not services at all but merely sources of revenue." Order No. 74 (April 29, 2008) at 7-12.

Because the sale of ink jet cartridges is a nonpostal service, two independent provisions of the PAEA bar the Postal Service from entering this market. First, the Postal Service did not begin offering ink jet cartridges until November 2007, almost two years after the cutoff date set by 39 U.S.C. § 404(e)(2).<sup>1</sup> Second, and in any event, the Postal Service does not contend that the sale of USPS-branded remanufactured ink jet cartridges would satisfy 39 U.S.C. § 404(e)(3)(B), which requires that a nonpostal service meet some public need that the private sector cannot satisfy.

(2)

That the Postal Service is offering ink jet cartridges through a licensing arrangement with a private party rather than directly is a distinction without a difference. Licensing arrangements raise both of the policy concerns that prompted Congress to curtail the Postal Service's power to offer nonpostal services. First, licensing arrangements, like the direct sale of nonpostal services, divert resources from the core responsibilities (and competence) of the Postal Service. The notion that the Postal Service's sole task as a licensor is to count the royalties as they flow in is nonsensical. If only to protect the integrity of the Postal Service brand, the Postal Service as licensor must devote resources to establishing quality standards for the licensed products, and to verifying that those standards are met over the entire term of the license agreement.

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<sup>1</sup> See Response of the USPS to Pitney Bowes Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services (Oct. 22, 2008) at 2.

See USPS Response (Nov. 17, 2008), Statement of Gary A. Thuro at 4-5 (describing Postal Service's responsibilities as licensor).

Second, the licensing of USPS-branded postage meter replacement cartridges—or any other product or service that is a complement to postal services—raises the same vertical competitive issues as would the direct sale of USPS-branded cartridges. The Postal Service has the power to set technical and design standards not only for postage meter ink but also for postage meters. But the creation of a royalty arrangement under which the Postal Service's royalty income depends on the net revenue generated by the USPS-branded cartridges gives the Postal Service an economic stake in maximizing their sales revenue. Allowing the Postal Service to act simultaneously as a participant in product markets it regulates would create an incentive for the Postal Service to squeeze out independent suppliers of the product (here, ink jet cartridges) by giving the licensee “privileged access to its technical requirements or even adopt standards preferentially beneficial to that manufacturer.” *Cf. United States v. Western Elec. Co., Inc.*, 12 F.3d 225, 232 (D.C. Cir. 1993).<sup>2</sup>

(3)

The Postal Service gains nothing by comparing the marketing of USPS-branded ink jet cartridges to the sale or leasing of “real property, or tangible personal property.”

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<sup>2</sup> The undersigned parties take no position on whether the Postal Service should be allowed to continue licensing the USPS brand to private sellers of toys, apparel or other consumer goods that are not complementary inputs with postal services. It can be argued that the primary purpose of the latter licensing activities is not to generate royalty revenue, but to advertise the USPS brand. In this respect, these activities are clearly distinguishable from licensing the USPS brand to the marketer of remanufactured ink jet cartridges.

USPS Response at 8. The two activities are clearly distinguishable on several grounds. First, the disposition of surplus USPS property originally acquired for the purpose of providing postal services is arguably ancillary to the provision of those services, and thus may itself constitute a postal service under 39 U.S.C. § 102(5). Alternatively, if the disposition of surplus postal property is considered a nonpostal activity, it clearly warrants grandfathering under 39 U.S.C. § 404(e). The Postal Service has been disposing of surplus property since before 2006; the disposition of such property benefits the public by minimizing the Postal Service's institutional costs; this benefit can be realized only through the disposition of the Postal Service's own excess assets; and the absence of Postal Service market power or regulatory authority over real estate markets avoids the competitive concerns raised by the marketing of USPS-licensed postage meter ink jet cartridges. The unexceptionable character of the Postal Service's disposition of real estate and similar surplus assets is underscored by the absence of any comments from any interested party advocating an end to this activity.<sup>3</sup>

(4)

Equally unavailing is the Postal Service's contention that treating the licensing of the USPS brand to the sellers of ink jet cartridges is a nonpostal service within the meaning of 39 U.S.C. §§ 102(5) and 404(e)(1) would produce nonsensical results because "it is not apparent what exactly the Commission would regulate under chapter 36." USPS Response at 7. The short answer is that the Commission would not regulate the service at all: the service must be discontinued.

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<sup>3</sup> A closer analogy would arise if the Postal Service decided to enter the business of real estate development, buying and leasing real estate parcels far in excess of its own postal needs. This activity almost certainly would run afoul of 39 U.S.C. § 404(e).

## CONCLUSION

For the foregoing reasons, the Postal Service's entry into the ink jet cartridge product market through the licensing of USPS-branded ink jet cartridges is forbidden by 39 U.S.C. § 404(e). The Commission should order the Postal Service to terminate those licensing arrangements.

Respectfully submitted,

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